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No. 91-1195

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHINA EVERBRIGHT TRADING COMPANY, PETITIONER

v.

TIMBER FALLING CONSULTANTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 violates the Due Process Clause by allowing a federal court to exercise personal jurisdiction over a foreign state based on the foreign state's contacts with the United States, rather than on its contacts with the State in which the federal court sits.

2. Whether the Consular Convention between the United States and the People's Republic of China is "an applicable international convention on service of judicial documents" for purposes of the Foreign Sovereign Immunities Act.

3. Whether petitioner is entitled to relief from a default judgment under Fed. R. Civ. P. 60(b).

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner China Everbright Trading Company seeks relief from a default judgment entered by the United States District Court for the District of Oregon in favor of respondent Timber Falling Consultants, Inc. (TFC). Petitioner, which is a "foreign state" for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602 *et seq.*, contends that the district court lacked personal jurisdiction to enter the default judgment, that service was defective, and that it is entitled to relief from the judgment for

"excusable neglect" (Fed. R. Civ. P. 60). The district court refused to set aside the judgment (Pet. App. B1-B12), and the court of appeals affirmed (*id.* at A1-A14).[1]

1. The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The statute specifically addresses the questions of subject matter and personal jurisdiction in the federal courts. Section 1330(a), which governs subject matter jurisdiction, states:

> The district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489.

Section 1330(b), which governs personal jurisdiction, states:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the

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[1] Petitioner filed its petition for a writ of certiorari under the name Beijing Ever Bright Industrial Company. In an April 29, 1992, letter to the Deputy Clerk, petitioner informed the Court that it has since changed its name to China Everbright Trading Company. See Petition For A Writ Of Certiorari, *China Everbright Trading Co.* v. *Timber Falling Consultants, Inc.*, No. 92-31, at ii, n.*.

> district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. 1330(b). Thus, the FSIA provides that a federal district court shall have personal jurisdiction over a foreign state if: (a) the foreign state is amenable to the court's subject matter jurisdiction under the exceptions to foreign sovereign immunity set forth in Sections 1605 through 1607; and (b) the foreign state is properly served under Section 1608.

Section 1605(a)(2) of the FSIA—the immunity exception relevant to this case—provides that a foreign state is not entitled to immunity if the state engages in commercial activity bearing a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2]

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[2] The FSIA's definitions state:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the

Section 1608(b)—the service provision relevant to this case—provides that service may be accomplished by delivery of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(b)(2). It further provides, however, that if service cannot be made through that method, it may be accomplished through certain other methods of delivery "reasonably calculated to give actual notice," including "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served." 28 U.S.C. 1608(b)(3).

2. Petitioner is a corporation organized under the laws of the People's Republic of China and engaged in import and export trade. In early 1988, petitioner contracted with Richmark Corporation, a U.S. company, to purchase timber. Richmark subcontracted with respondent TFC, which is also a U.S. company, to procure the timber. The dispute before this Court originated when Richmark brought a breach of contract action against TFC based on TFC's failure to deliver the timber as promised. TFC asserted counterclaims against Richmark and third-party claims against petitioner and others, alleging breach of contract, fraud and civil conspiracy, and tortious interference. Pet. App. A5-A6, B5-B6.

On March 20, 1989, TFC served petitioner with a summons and the third party claims through private

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course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

express mail delivery to petitioner in Beijing, China. Petitioner did not appear or respond to the summons within the sixty-day period specified in the summons. On June 9, 1989, the district court entered an order of default. Pet. App. A6, B5, C3. Nearly one year later, on June 5, 1990, after all claims against the other defendants had been resolved, the district court entered final judgment against petitioner on the contract, fraud, and civil conspiracy claims. *Id.* at A6, B5. The district court awarded TFC approximately $2.2 million to compensate for lost profits, pre-judgment interest, and assorted expenses. See *id.* at C1-C5.

3. On August 2, 1990, petitioner filed a motion under Rule 60, Fed. R. Civ. P., for relief from the default judgment. Petitioner argued that the judgment was void, because the district court lacked personal jurisdiction over petitioner and because petitioner's failure to appear was excusable in light of political events occurring in China at the time petitioner received notice of the suit. The district court denied petitioner's motion. It concluded that petitioner was a foreign state for purposes of the FSIA and therefore subject to the FSIA's jurisdictional provisions. Pet. App. B7-B8. Noting that the evidence suggested that petitioner had contacts with both the United States and the State of Oregon, the court concluded that petitioner "has failed to produce evidence that tends to establish its defense of lack of personal jurisdiction." *Id.* at B8-B9. The court also observed that petitioner "does not contest that it was properly served under the FSIA" and concluded that the "claim of defective service must also fail." *Id.* at B9. The court rejected petitioner's argument that political

events in China excused its appearance, noting among other things that petitioner had failed to show "why it could not have communicated with the court by mail or other means during the period of more than a year between the time it was served and the entry of the final judgment." *Id.* at B10.

The court of appeals affirmed. The court noted at the outset that petitioner no longer contested that it was a foreign state for purposes of the FSIA. Pet. App. A7 n.1. It concluded that the district court had personal jurisdiction, stating that the issue "under the FSIA is determined by resorting to the traditional minimum contacts tests." *Id.* at A7, citing *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), cert. denied, 493 U.S. 891 (1989). The court determined that "the relevant area in delineating contacts is the entire United States," citing *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), cert. denied, 484 U.S. 976 (1987), and that petitioner's contacts with the United States "certainly may be characterized as substantial." Pet. App. A8.

The court of appeals also rejected petitioner's contention that service was defective under the FSIA. Petitioner primarily argued that the Consular Convention between the United States and the People's Republic of China (US-PRC Consular Convention), Feb. 19, 1982, 33 U.S.T. 2973, T.I.A.S. No. 10209, is "an applicable international convention on service of judicial documents," 28 U.S.C. 1608(b)(2), and that Section 1608(b)(3) of the FSIA required TFC to attempt service through the use of that Convention before resorting to private express mail. See 28 U.S.C. 1608(b)(3). The court of appeals rejected that argument, concluding that "[t]he Con-

sular Convention is not an 'applicable international convention *on service of judicial documents*' under § 1608(b)(2). Rather, the convention governs the privileges, activities, and immunities of consulates and their officers." Pet. App. A10.

The court of appeals likewise rejected petitioner's contention that the district court erred in refusing to set aside the default judgment. The court of appeals observed that "[a] district court's decision on a Rule 60(b) motion is reviewed for abuse of discretion." Pet. App. A11-A12, citing *Thompson* v. *Housing Auth. of Los Angeles*, 782 F.2d 829, 832 (9th Cir.), cert. denied, 479 U.S. 829 (1986). The court of appeals held that the district court did not abuse its discretion in concluding that petitioner could not rely on political disruptions in China as an excuse for failing to answer the summons. The court explained that petitioner "simply alleges that the [People's Republic of China] refused to issue it an exit visa." Pet. App. A12-A13. Petitioner "presented no evidence to explain why it could not have communicated with the court through other channels." *Id.* at A13.[3]

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[3] The court of appeals also affirmed the district court's separate order granting a judgment debtor examination. The court of appeals held that it lacked jurisdiction to review petitioner's claim that the order was overbroad, because the district court had not found petitioner in contempt of the order granting the judgment debtor examination. Pet. App. A13, citing *In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.*, 857 F.2d 1238, 1239 (9th Cir. 1988). Petitioner does not contest that ruling in its petition for a writ of certiorari.

DISCUSSION

Petitioner urges this Court to grant the petition for a writ of certiorari to resolve three issues: (1) whether a federal court may constitutionally exercise personal jurisdiction over a foreign party based on its "national contacts" (Pet. 13-23); (2) whether the US-PRC Consular Convention is an "applicable international convention on service of judicial documents" for purposes of Section 1608(b)(2) of the FSIA (Pet. 24-27); and (3) whether the court of appeals erred in affirming the district court's refusal to set aside a default judgment under Rule 60, Fed. R. Civ. P., for "excusable neglect" (Pet. 27-30). In our view, the petition does not raise issues currently warranting this Court's attention.

1. As this Court has explained, a federal court generally may not exercise personal jurisdiction over a non-consenting foreign defendant unless there is "a constitutionally sufficient relationship between the defendant and the forum" and "authorization for service of summons on the defendant." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). The Court has not definitively determined what contacts between a foreign defendant and the forum create a "constitutionally sufficient relationship" in those cases in which Congress has authorized extraterritorial service of process. *Id.* at 102 n.5. See also *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 113 n.* (1987). The courts of appeals, however, have held that a federal court should examine whether the defendant has a sufficient relationship with the United States as a whole, rather than with the particular State where the federal court sits. See, *e.g.*, *Go-Video, Inc.* v. *Akai Elec. Co.*, 885 F.2d 1406, 1414 (9th Cir. 1989) (Clayton Act); *Se-*

curities Investor Protection Corp. v. *Vigman*, 764 F.2d 1309, 1315-1316 (9th Cir. 1985) (Securities Exchange Act); *Fitzsimmons* v. *Barton*, 589 F.2d 330, 333 & n.4 (7th Cir. 1979) (Securities Exchange Act); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1340-1341 (2d Cir. 1972) (Securities Exchange Act). Cf. *Chandler* v. *Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990) (refusing to apply a "national contacts" test in the absence of an applicable federal statute authorizing nationwide service of process).

Petitioner argues that this Court should grant review to resolve the constitutionality of the "national contacts" test. Pet. 14-15. As petitioner acknowledges, however, there is no square conflict among the courts of appeals on that question. Pet. 19.[4] Even if such a conflict existed, this case would not be an appropriate vehicle by which to resolve it. The FSIA does not simply provide for extraterritorial service of process. Rather, it provides a "comprehensive set of legal standards" for exercising juris-

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[4] Petitioner asserts that this Court's decision in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites*, 456 U.S. 694 (1982), which holds that the personal jurisdiction requirement restricts judicial power "not as a matter of sovereignty, but as a matter of individual liberty" (*id.* at 702), "has led several courts to reassess the requirements of personal jurisdiction in federal cases with nationwide or worldwide service of process." Pet. 18. Although petitioner cites two court of appeals cases among its examples, neither case rejects the "national contacts" standard or expressly indicates any "erosion" (*id.* at 19) of that standard. See *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344 n.8 (11th Cir. 1988), rev'd on other grounds *sub nom. Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989); *Burstein* v. *State Bar of California*, 693 F.2d 511, 515-516 (5th Cir. 1982).

diction over foreign states. *Verlinden*, 461 U.S. at 488. Unlike the Clayton Act, 15 U.S.C. 22, or the Securities Exchange Act, 15 U.S.C. 78aa, which simply allow service on the defendant "wherever" found, the FSIA specifically states when "[p]ersonal jurisdiction over a foreign state shall exist." 28 U.S.C. 1330(b).

As we have explained, the FSIA affirmatively grants a federal court personal jurisdiction over a foreign state in any case in which the FSIA deprives the foreign state of immunity. 28 U.S.C. 1330(b). See pp. 2-3, *supra*. Of particular relevance here, the FSIA provides that a foreign state shall not be immune from the jurisdiction of those courts in any case

> in which the action is based upon a commercial activity carried on *in the United States* by the foreign state; or upon an act performed *in the United States* in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect *in the United States*.

28 U.S.C. 1605(a)(2) (emphasis added). Section 1603(e) defines a "commercial activity carried on in the United States by a foreign state" as commercial activity having "substantial contact with the United States." 28 U.S.C. 1603(e). Thus, the FSIA expressly employs a "national contacts" test in determining whether a foreign state is subject to a federal court's personal jurisdiction in cases involving commercial activity.[5]

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[5] Congress quite naturally employed a national contacts test in that context. As this Court has noted, "[f]or local

Petitioner's due process challenge, which rests on the broad assertion that "personal jurisdiction based on aggregate national contacts violates the Due Process Clause" (Pet. 14), is ineluctably a challenge to the FSIA's personal jurisdiction provisions. Those provisions are the basis for the court's exercise of jurisdiction over petitioner, and they are the source of the "national contacts" test in this case. Although petitioner suggests otherwise, this Court cannot resolve petitioner's due process challenge without inquiry into the constitutionality of a federal statute, which would involve the Court in "the gravest and most delicate duty" it can be called upon to perform. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).[6]

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interests, the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889). See *United States* v. *Belmont*, 301 U.S. 324, 331-332 (1937).

[6] Petitioner contends that its challenge "is not to the constitutionality of 28 U.S.C. §§ 1330 or 1608 as such, but rather to their application here ostensibly to obtain personal jurisdiction over petitioner based on an aggregate of national contacts." Pet. 15 n.17. Petitioner fails to explain, however, what distinguishes the application of the FSIA here from its application in any other situation in which personal jurisdiction is asserted over a foreign state "based upon commercial activity carried on in the United States." 28 U.S.C. 1605(a)(2). Petitioner also makes the narrower argument that "personal jurisdiction based on aggregate national contacts violates the Due Process Clause of the Fifth Amendment where the cause of action asserted is based on state law" (Pet. 22). That argument, however, is also a challenge to the Act itself, because Section 1330(b) facially applies "to every claim for relief" over which the district courts have subject matter jurisdiction under 28 U.S.C. 1330(a), and petitioner does not contend that the district court would lack subject matter jurisdiction over state law claims.

There is no current need for this Court to examine the constitutionality of the FSIA. We know of no court decision holding that the FSIA is unconstitutional, and the lower courts have repeatedly applied the FSIA's national contacts test without suggestion that the test violates due process. See, *e.g.*, Pet. App. A8; *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), cert. denied, 484 U.S. 976 (1987); *Maritime Int'l Nominees* v. *Republic of Guinea*, 693 F.2d 1094, 1105-1109 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 314-315 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Indeed, a substantial antecedent question exists whether a foreign state is even entitled to protection under the Due Process Clause. See *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2169 (1992). That question apparently was not raised below and should not be addressed for the first time in this Court.[7]

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[7] Assuming that petitioner is entitled to invoke the Due Process Clause, petitioner would be required to shoulder a "heavy burden" in demonstrating that Congress exceeded constitutional limits. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Congress drew upon due process principles when formulating the FSIA's personal jurisdiction provisions. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13-14 (1976). Moreover, the courts are obligated to give great respect to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). That respect is especially appropriate in the case of legislation involving the United States' relations with foreign nations. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

2. Petitioner's contention (Pet. 24-27) that the court of appeals erred in refusing to treat the US-PRC Consular Convention as an "applicable international convention on service of judicial documents," 28 U.S.C. 1608(b)(2), also does not warrant further review. The court of appeals correctly concluded that the consular convention, which "governs the privileges, activities, and immunities of consulates and their officers" (Pet. App. A10), is not a service convention. "The fact that one of forty-two articles (Article 29) in the convention allows consular officials to serve legal documents does not convert the focus of the convention to service of judicial documents." Pet. App. A10-A11.[8]

The legislative history of the FSIA supports that conclusion. The House Report does not equate consular conventions with service conventions. Instead, it states:

> The *only* such convention [on service of judicial documents] to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents [Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163].

H.R. Rep. No. 1487, *supra*, at 24 (emphasis added). There is no merit to petitioner's argument that the US-PRC Consular Convention would have been included as a service convention if it had been in effect at the time. Pet. 25. The Vienna Convention on Con-

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[8] Article 29, 33 U.S.T. 2998, which provides in relevant part that a "consular officer shall be entitled to serve judicial and other legal documents," merely allows—but does not require—service through consular channels. See Pet. App. F9-F10.

sular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, similarly states that "consular functions" shall include "transmitting judicial and extra-judicial documents." Art. 5(j), 21 U.S.T. 84. Although the Vienna Convention has been in effect in the United States since 1969 and was therefore in effect when the House Report was prepared, the House Report did not list it as a service convention within the meaning of Section 1608 (b)(2).

In short, the court of appeals correctly held that the US-PRC Consular Convention is not an "applicable international convention on the service of judicial documents." 28 U.S.C. 1608(b)(2). Because the consular convention falls outside the scope of Section 1608(b)(2) of the FSIA, and the People's Republic of China was not a party to the Hague Service Convention at the time of service in this case, TFC was entitled to invoke the service provisions of Section 1608(b)(3)(B) of the FSIA. Petitioner does not cite any conflicting judicial decision and does not identify any other compelling reason for further review.

3. Petitioner's contention that the court of appeals erred in refusing to set aside the default judgment (Pet. 27-30) also warrants no further review. The courts of appeals apply an "abuse of discretion" standard when reviewing a district court's resolution of a motion pursuant to Rule 60(b), Fed. R. Civ. P., to set aside a default judgment. See, *e.g.*, *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d at 832. See generally 11 C. Wright & A. Miller, *Federal Practice and Procedure* 2857, 2872 (1973). Petitioner does not quarrel with that standard, but argues in-

stead that the district court did not give sufficient weight to various factors in finding that petitioner's neglect was not "excusable." Fed. R. Civ. P. 60(b). See Pet. 27-28.

The court of appeals properly held that the district court did not abuse its discretion in weighing the relevant factors. Petitioner basically alleges that it knew that "the summons merited some response," but its legal officer, Liu Yan-Sheng, did not appear or otherwise respond because the "domestic situation in the People's Republic of China and numerous serious diplomatic obstacles prevented Liu from obtaining a visa." Pet. 8-9. The district court concluded that those allegations did not suffice to establish excusable neglect, stating:

> The court accepts the fact that public events in the People's Republic of China disrupted the conduct of business in Beijing in 1989, and ha[ve] disrupted relations between the United States and the People's Republic of China to the present time. However, [petitioner] does not present evidence that it made any other efforts to respond to the claims of TFC, or to secure an extension of time from TFC, despite Liu's admitted knowledge that failure to respond could result in a default judgment. On the other hand, TFC has presented evidence that during this same period of time, [petitioner] was able to secure counsel in the States of Washington and New York to deal with other matters. [Petitioner] has submitted no evidence showing why it could not have acted through such counsel or why it could not have communicated with the court by mail or other means during the period of more than a year between the time it was served and the entry of the final judgment.

Pet. App. B10. The court of appeals concluded that "[i]n light of this evidence, we cannot say that the district court abused its discretion." Pet. App. A13. That conclusion, which simply holds that the district court did not act arbitrarily in applying Rule 60(b) to the facts of this case, does not present a question of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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